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No. 88-2018

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

THE STATE OF ILLINOIS,
Petitioner,

v.

EDWARD RODRIGUEZ,
Respondent.

On Writ of Certiorari to the
Appellate Court of the State of Illinois
First Judicial District

BRIEF FOR THE PEOPLE OF THE STATE OF CALIFORNIA AS AMICUS CURIAE

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QUESTION PRESENTED

Does a police officer's reasonable reliance upon a third party's apparent authority to consent to an entry or a search constitute "unreasonable" conduct within the meaning of the Fourth Amendment, thereby invoking the exclusionary rule?

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INTEREST OF THE PEOPLE OF THE STATE OF CALIFORNIA

"While the so-called apparent authority doctrine has been increasingly relied upon by the lower courts in recent years in upholding third party consent searches, the doctrine has been most regularly employed in the state of California, where it originated in the 1955 decision in *People* v. *Gorg* [291 R.2d 469, 473 (1955) (Traynor, J.)]."

3 LaFave, *Search and Seizure*, pp. 262-263 (2d ed. 1987); see, e.g., *People* v. *Hill*, 72 Cal.Rptr. 641, 644 (1968), *aff'd*, *Hill* v. *California*, 401 U.S. 797 (1971); *People* v. *Robinson*, 116 Cal.Rptr. 455, 460-461 (1974).

The Illinois state courts have rejected the apparent authority to consent concept, however, based on their misreading of this Court's decisions in *Stoner* v. *California*, 376 U.S. 483 (1964) and *United States* v. *Matlock*, 415 U.S. 164 (1974). See, e.g., *People* v. *Bochniak*, 417 N.E.2d 722, 724 (Ill.App. 1981).

Our interest in vindicating a doctrine which recognizes that mistakes made by policemen acting reasonably cannot be deterred by the exclusionary rule and may not fairly be characterized as "unreasonable" conduct under the Fourth Amendment, brings the State of California before this Honorable Court as amicus curiae in support of petitioner.

SUMMARY OF ARGUMENT

This Court has held that law enforcement officers may rely upon the consent of a third party who has actual authority to permit a warrantless search of another's premises. *United States* v. *Matlock*, 415 U.S. 164 (1974). Illinois state courts have rejected the majority view that policemen also may reasonably rely upon the apparent authority of a third party to give such consent. In this case, the difference between the third party's actual authority and apparent authority to consent lies in a police officer's reasonable mistake of fact. *Hill* v. *California*, 401 U.S. 797 (1971) and *Maryland* v. *Garrison*, 480 U.S. 79 (1987), both overlooked below, teach that a policeman's reasonable mistake of fact is not "unreasonable" conduct within the meaning of the Fourth Amendment.

The validity of the apparent authority doctrine does not turn on the often elusive distinction between mistakes of fact and mistakes of law, however, but on the reasonableness of the officer's reliance on the consent. Because policemen are not required to be experts on landlord-tenant law, for example, Fourth Amendment goals are no more jeopardized by forgiving an officer's reasonable mistake of property law than by forgiving his reasonable mistake of fact.

Although this Court repeatedly has identified as separate questions the contours of Fourth Amendment privacy and the scope of the exclusionary rule, the court below failed to consider the reasonableness of the officers' actions as relevant to the remedy of suppression. The deterrent effect of the exclusionary rule is weakest where the official conduct sanctioned results from a reasonable misapprehension of pertinent facts. *Michigan* v. *Tucker*, 417 U.S. 433, 447 (1974) broadly recognized this inherent limitation of the suppression doctrine. *United States* v. *Calandra*, 414 U.S. 338, 348 (1974) restricted the

application of the exclusionary rule "to those areas where its remedial objectives are thought most efficaciously served." The court below was not mindful of these limitations. Because it failed to consider both the substantive and remedial implications of the reasonableness of the police officers' good faith mistake, the judgment of the Appellate Court of the State of Illinois must be reversed.

ARGUMENT

A POLICEMAN'S REASONABLE MISTAKE AS TO A THIRD PARTY'S ACTUAL AUTHORITY TO CONSENT IS NOT, WITHIN THE MEANING OF THE FOURTH AMENDMENT, "UNREASONABLE" CONDUCT INVOKING THE EXCLUSIONARY RULE

"The question whether the exclusionary rule's remedy is appropriate in a particular context has long been regarded as an issue separate from the question whether the Fourth Amendment rights of the party seeking to invoke the rule were violated by police conduct." *Illinois* v. *Gates*, 462 U.S. 213, 223 (1983), quoted in *United States* v. *Leon*, 468 U.S. 897, 906 (1984).

The Illinois court incorrectly resolved both questions. First, in holding that official reliance upon a third party's consent given without actual authority automatically violates the Fourth Amendment, the court below focused exclusively on the existence of a constitutional right of privacy, without considering whether the police intrusion into protected privacy was "unreasonable" within the meaning of the Fourth Amendment. This approach forgets that "the Fourth Amendment does not proscribe all searches and seizures, but only those that are unreasonable," *Skinner* v. *Railway Labor Exec. Ass'n*, 103 L.Ed.2d 639, 661 (1989), and

ignores the teaching of *Maryland* v. *Garrison*, 480 U.S. 79, 88 (1987) and *Hill* v. *California*, 401 U.S. at 804, that an officer's mistake of fact, if reasonable in the tort law sense, may be reasonable in the constitutional sense. Second, the state court suppressed evidence without considering the propriety of imposing the exclusionary rule, thereby ignoring the teaching of *United States* v. *Calandra*, 414 U.S. 338, 348 (1974), that "[a]s with any remedial device, the application of the rule has been restricted to those areas where its remedial objectives are thought most efficaciously served."

A. A Police Officer's Reasonable Mistake of Fact Is Not "Unreasonable" Conduct Under he Fourth Amendment

In this case, the officer's belief that the consenting party had actual authority to permit a police entry constituted a reasonable mistake of fact. Gail Fisher told Officer Entress that Edward Rodriguez had beaten her earlier that day at the South California Street apartment where they had been living, where she kept her clothes and furniture, and to which she possessed a key. Fisher told Officer Entress that Rodriguez was sleeping in the apartment and admitted the police with her key in order to facilitate his arrest. Officer Entress had gained the impression that Fisher was presently residing at the South California address. While arresting Rodriguez, police officers seized narcotics which they observed in plain view.

After a hearing, the trial court suppressed this evidence, concluding that Fisher lacked actual authority to consent to the police entry because: (1) her name was not on the lease and she did not pay rent; (2) the apartment was not her usual place of residence; (3) Fisher enjoyed access to the apartment only when Rodriguez was present; (4) she did not bring guests to the apartment; (5) Fisher had removed her children and her clothing to her mother's residence, where she contacted the police.

Officer Entress believed that Gail Fisher resided at the South California address. Had Fisher in fact been a resident there, his assumption that she possessed legal authority to admit him would have been correct. In short, the officer's mistake was one of fact, not law.

Although mistaken, the officer's belief was reasonable because it was based on a presumptively reliable citizen-informant's statements that she had been living in the apartment, that she had been there earlier that day, and that her clothing and furniture remained there. These representations, together with Fisher's present possession of a key to the apartment, would lead a reasonably well trained police officer to believe that Fisher had actual authority to admit others into the flat.

The state trial court erred in failing to inquire into the reasonableness of Officer Entress' belief.[1] The state appellate court ratified this error on the authority of *United States* v. *Matlock*, which expressly reserved the question of apparent authority. 415 U.S. at 177 n.14. Instead, the Illinois courts should have been guided by this Court's decisions in *Hill* v. *California*, *supra*, and *Maryland* v. *Garrison*, *supra*.

Hill v. *California* excused a police officer's reasonable mistake of fact. Having probable cause to believe Hill had committed armed robbery, the police went to his apartment without a warrant. Miller, "who fit the description of Hill received from various sources," answered the door. 401 U.S. 799, 803. The officers, discrediting Miller's personal identification, his explanation for his presence in Hill's apartment, and his professed

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1. The state courts' rejection of the apparent authority doctrine having foreclosed this inquiry, factual findings favorable to the State must be assumed for purposes of determining whether the case should be remanded to the trial court for further evidentiary hearing.

ignorance of a pistol and ammunition clip in plain view, arrested Miller believing he was Hill.

> "They were quite wrong as it turned out, and subjective good-faith belief would not in itself justify either the arrest or the subsequent search. But sufficient probability, not certainty, is the touchstone of reasonableness under the Fourth Amendment and on the record before us the officers' mistake was understandable and the arrest a reasonable response to the situation facing them at the time." 401 U.S. at 804.

Consequently, although Miller was later released, evidence discovered during a search of Hill's apartment incident to Miller's arrest was held admissible against Hill.

Hill did not reach this conclusion by reasoning either that the police had "probable cause" to arrest Miller, or that exclusion of evidence cannot deter reasonable mistakes of fact. Accordingly, *Hill* holds that a policeman's reasonable mistake of fact in identifying a person lawfully subject to arrest is not an "unreasonable" seizure within the meaning of the Fourth Amendment.

Following the *Hill* rationale, *Maryland* v. *Garrison* held that a police officer's reasonable mistake of fact in identifying the premises to be searched under a warrant is not conduct "unreasonable" under the Fourth Amendment. 480 U.S. at 88.

Garrison indicates that Fourth Amendment reasonableness may depend as much upon what the police

should find out as upon what they know.[2] The Illinois courts' criteria for determining actual authority offers a useful standard for assessing the adequacy of Officer Entress' investigation. Since actual authority "is, of course, not to be implied from the mere property interest a third party has in the property," *United States* v. *Matlock*, 415 U.S. at 171 n. 7, the officer's failure to demand Ms. Fisher's lease or rent receipts is not constitutionally fatal. Were the law otherwise, policemen might be asked to while away their duty hours in the county recorder's office or to file quiet title actions. Contra, *People* v. *Superior Court*, 83 Cal.Rptr. 732, 735 (Cal.App. 1976).

Officer Entress reasonably inferred from the circumstances that the South California address was Fisher's usual residence. That he interviewed Fisher in her mother's home did not undermine that inference given Rodriguez's beating of Fisher earlier that day.

Fisher's possession of a key was compelling evidence of unlimited access to the apartment. No competent officer would expect Fisher to have a key if she could enter only when Rodriguez was present, for he could admit her as easily as the key.

Nor was Officer Entress required to question Fisher about whether she invited guests to the apartment, for an affirmative response would add little to what Entress had learned, and a negative response would have been

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2. "The validity of the warrant must be assessed on the basis of the information that the officers disclosed, or had a duty to discover and disclose, to the issuing magistrate." 480 U.S. at 85.

consistent with Fisher's refusal to tell the officer whether Rodriguez was involved with narcotics.

Finally, discovering that Fisher had removed her two children from the apartment would have suggested to any reasonably competent officer only that she did not want them beaten, too.

Actual authority to consent to a police entry "rests on mutual use of the property . . . ." *United States* v. *Matlock*, 415 U.S. at 171 n. 7. Officer Entress reasonably concluded that Gail Fisher enjoyed joint access and mutual use of the South California premises. Therefore, the officer was not constitutionally derelict in failing to undertake a time-consuming investigation that offered little prospect of yielding convincing contrary evidence.

B. A Police Officer's Reasonable Mistake of Law Is Not "Unreasonable" Conduct Under the Fourth Amendment

Illinois' rejection of the apparent authority doctrine has less to do with *United States* v. *Matlock* than with *Stoner* v. *California*, *supra*. See, e.g., *People* v. *Bochniak*, 417 N.E.2d at 724. In *Stoner*, state officers searched the defendant's hotel room without a warrant after being admitted by the hotel night clerk in Stoner's absence. The California Court of Appeal upheld the search as incident to Stoner's arrest in Nevada two days later. 376 U.S. at 859. In this Court, the California Attorney General acknowledged that the holding below was aberrant as a matter of state law, but argued that the search was justified by the consent of the hotel night clerk. *Id.* at 860. This Court disagreed, finding no

reasonable basis for the officers' belief that the clerk had authority to consent to search. *Ibid.*

The officers' mistake in *Stoner* was of law, not fact; the police knew that the consenting party was the hotel clerk, but did not know the scope of his legal authority to admit strangers into guests' rooms. *Stoner* is easily distinguished, as by some, based on the difference between an officer's mistake of fact and his mistake of law. E.g., 3 LaFave, *supra*, at 262 n.96. Such a distinction, however, overlooks the central point of *Stoner* and requires absurd results in the application of the apparent authority rule.

The actions of the police in *Stoner* were not constitutionally unreasonable because their mistake was one of law, rather than of fact; instead, their conduct was unreasonable in the tort law sense, i.e., it fell below the behavioral norm of a reasonably well trained officer. First, the officers' conduct violated state law.[3] "The *sine qua non* of the operation of the rule of *Gorg* is an honest belief based on reasonable grounds." *People* v. *Hill*, 72 Cal.Rptr. at 644 n. 5. Four years before the *Stoner* search the California Supreme Court had declared: "The entry of the officers cannot be justified on the ground that they reasonably believed in good faith that the [apartment] manager had authority to consent thereto." *People* v.

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3. It is one thing to say that Fourth Amendment reasonableness does not depend on the law of the particular state in which the search occurs, *California* v. *Greenwood*, 100 L.Ed.2d 30, 39 (1988), and another thing to say that a well trained officer need not know the state law limits on his authority.

Roberts, 303 P.2d 721, 722 (1956). Second, the officers' actions in *Stoner* were contrary to then-existing decisions of this Court. As *Stoner* explained, "[a]t least twice this Court has explicitly refused to permit an otherwise unlawful police search of a hotel room to rest upon the consent of the hotel proprietor." 376 U.S. at 489 (citing *United States* v. *Jeffers*, 342 U.S. 48 (1951) and *Lustig* v. *United States*, 338 U.S. 74 (1949)).

Stoner does not foreclose application of the apparent authority doctrine to an officer's reasonable mistake of property law; *Stoner* simply rejects an officer's subjective good faith as an excuse for his *un*reasonable mistake of constitutional law. Cf. *Anderson* v. *Creighton*, 483 U.S. 635, 641 (1987); *Illinois* v. *Krull*, 480 U.S. 340, 355 (1987); *United States* v. *Leon*, 468 U.S. 897, 923 (1984); *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982); *Michigan* v. *DeFillippo*, 443 U.S. 31, 38 (1979); *Glasson* v. *City of Louisville*, 518 F.2d 899, 910 (6th Cir.), *cert. denied*, 423 U.S. 930 (1975).

California's apparent authority to consent doctrine recognizes that "[p]olicemen are not required to be experts in the law of landlord and tenant." *People* v. *Robinson*, 116 Cal.Rptr. at 461. Fourth Amendment goals are not jeopardized by forgiving an officer's ignorance of a law he has no duty to know.

Further, the mistake of fact/mistake of law distinction is of limited use in the exclusionary rule context. The point of this dichotomy is to separate misapprehensions of fact which, if reasonable, are undeterrable, from misunderstandings of law which, if deterrable, must be held unreasonable. See *Michigan* v. *Tucker*, 417 U.S. 433, 447; *United States* v. *Whaley*, 781

F.2d 417, 421 (5th Cir. 1986). Unfortunately, "[w]hat is an error of fact and what is an error of law in a given matrix is not always capable of easy resolution." *People* v. *Washington*, 186 Cal.Rptr. 3, 5 (1982). Worse, this approach "begs the question . . . in that the seminal issue is that of *reasonableness*." *People* v. *Howard*, 208 Cal.Rptr. 353, 358 (1984).

C. The Exclusionary Rule Does Not Deter A Policeman's Reasonable Mistakes

In *Michigan* v. *Tucker*, 417 U.S. at 447, this Court explained:

> "The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least, negligent, conduct which has deprived the defendant of some right. By refusing to admit evidence gained as a result of such conduct, the courts hope to instill in those particular officers, or their future counterparts, a greater degree of care toward the rights of an accused. Where official action was pursued in complete good faith, however, the deterrence rationale loses much of its force."

The deterrent effect of the exclusionary rule is weakest where the illegality sanctioned results from a reasonable police misapprehension of relevant facts. A decision suppressing evidence may instruct the police as to the law they must follow henceforth, but such a decision cannot alter their perception of facts in future cases. As

recognized in *People* v. *Gurley*, 100 Cal.Rptr. 407, 419 (1972):

> "In the situation where the officers act reasonably on the evidence before them . . . the exclusion of evidence seized with [defendant's] apparent consent will not prevent similar conduct in the future under similar conditions. No deterrence is involved if the officers have acted in good faith on the facts as they appeared, because presumably they will be entitled to, and will, so act again in the future." Cf. *Colorado* v. *Connelly*, 479 U.S. 157, 166 (1986).

No deterrence results, either, from suppressing evidence resulting from a policeman's reasonable misapprehension of law he is under no duty to know. Accordingly, the exclusionary rule was misapplied below when the state court suppressed evidence without taking into account the reasonableness of the officer's good faith mistake. See *United States* v. *Calandra*, 414 U.S. at 348.

CONCLUSION

The judgment of the Appellate Court of the State of Illinois should be reversed and the case should be remanded for further proceedings.

DATED: December 14, 1989

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CERTIFICATE OF SERVICE BY MAIL

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THE STATE OF ILLINOIS,
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EDWARD RODRIGUEZ,
Respondent.

CLIFFORD K. THOMPSON, JR., a member of the Bar of the Supreme Court of the United States, states:

That his business address is 455 Golden Gate Avenue, Room 6000, in the City and County of San Francisco, State of California; that on December 14, 1989, he served true copies of the attached Brief for the People of the State of California as Amicus Curiae in the above-entitled matter on counsel for petitioner by placing same in envelopes addressed as follows:

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Said envelopes were then sealed and deposited in the United States mail at San Francisco, California, with the postage thereon fully prepaid.

CLIFFORD K. THOMPSON, JR.
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